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NO. 88-1945

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ATLAS PAPER BOX COMPANY,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Authorities	iii
Argument	1
Conclusion	8

TABLE OF AUTHORITIES

Case	Page
Wards Cove Packing Co. v. Atonio, ___ U.S. ___ , 109 S.Ct. 2115 (1989).	1, 2, 4, 5, 8

ARGUMENT

This reply brief is being filed to discuss the recent decision of Wards Cove Packing Co. v. Atonio, __ U.S. __, 109 S.Ct. 2115 (1989), decided after the Petition was filed in this case. In light of that recent decision the decision of the United States Court of Appeals for the Sixth Circuit should be reversed and the district court's decision reinstated, or, in the alternative, the Sixth Circuit should rehear the case. In Wards Cove, this Court ruled that the burden of persuasion remains at all times with the disparate-impact plaintiff and that the employer is merely required to show that its employment practice "serves in a significant way the legitimate employment goals of the employer." Wards Cove, 109 S.Ct. at 2126. Respondent's claim that this decision has no bearing on the Sixth

Circuit's holding in the present case is erroneous.

Clearly, the court of appeals incorrectly concluded that respondent had made out a prima facie case of disparate impact; therefore, any further inquiry "into whether the specific challenged employment practices" of petitioner "caused that disparity is pretermitted, as is any inquiry into whether the disparate impact that any employment practice may have had ~~was~~ justified by business considerations." Id. at 2124. With regard to the disparate impact claim, the district court stated that, though respondent had made a prima facie case of "statistically significant adverse impact at least before 1978," petitioner's employment practice was not currently having an adverse impact on black

applicants.[1/] Yet, the court of appeals held the applicable time period to be from 1969 to present. Petitioner contends that logically the applicable time period is the last ten years. That blacks in the past could not pass this test at the same rate as whites may be of historical interest, but it should not prevent use of the test now - a time when the pass rates are essentially the same.

As respondent noted, the district court found that, although many blacks were employed in petitioner's plant,

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1. In examining the test results from 1969 to the present, the difference in the pass rates between white and black applicants is statistically significant. Yet, in examining the relative success of the two races during the last ten years there is no statistical significance between the pass-fail rate (sometime in 1978 Atlas formulated its policy of only hiring those who could score 25, unless, of course, no such person was available.)

petitioner has never had a black person working in its office[2/] and, moreover, that, although 63 blacks applied for clerical positions during the period from 1969 to 1984, none were hired. Yet, this Court declared in Wards Cove that "the initial inquiry in a disparate impact case is a comparison between the racial composition of the qualified persons in the labor market and the persons holding at issue jobs." Id. at 2121. In the present case, as in Wards Cove, the absence of blacks in petitioner's office, is due to the lack of qualified black applicants; thus, petitioner's use of the

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2. Actually, the Wonderlic test was used for all non-bargaining unit jobs. Two blacks were employed in such positions (plant clerical) after they passed the test.

Wonderlic Personnel Test cannot be said to have had a disparate impact on blacks. See Wards Cove, at 2122. In this case, the EEOC never identified the pool of qualified blacks for office clerical jobs.

Finally, even if this Court determines that respondent has made out a prima facie case of disparate impact, Wards Cove nevertheless requires the reversal of the lower court. As this Court noted there is "no requirement that the challenged practice be 'essential' or 'indispensable' to pass muster. Id. at 2126. Rather, the question is "whether the challenged practice serves, in a significant way, the legitimate employment goals of the employer." Id. Petitioner clearly produced sufficient evidence in justification of its employment practice, and, thus, satisfied its burden of production.

In the district court, petitioner offered substantial expert proof that it was not necessary to conduct a validation study of the Wonderlic Personnel Test at petitioner's place of business, and, moreover, that doing so would have been practically impossible. In support of petitioner's contention it introduced substantial expert testimony to the effect that the Wonderlic Personnel Test had been the subject of numerous validity studies at different locations, that these validity studies required the conclusion that the Wonderlic Personnel Test was a valid predictor of employee performance in clerical settings, that the Wonderlic Personnel Test was in fact a far better predictor of employee performance in clerical settings, that the Wonderlic Personnel Test was in fact a far better predictor of job performance than

virtually any other method of predicting employee performance and, most importantly, that the scientifically accepted generalization method for validating personnel tests made it unnecessary to conduct a separate validation study at petitioner's place of business. Furthermore, petitioner produced evidence that the use of the Wonderlic Personnel test resulted in enormous efficiency savings for the petitioner, possibly as much as One Million Dollars over the years. The district court concluded that this testimony was sufficient even though "no formal validation study was performed at [petitioner's business] itself," because "any attempt to validate the Wonderlic test on a clerical workforce as small as the one at Atlas would have been statistically meaningless" - a conclusion

which the court of appeals rejected. The petitioner clearly produced evidence to the effect that its employment practice did serve its legitimate employment goals. However, respondent, in its failure to produce evidence that the Wonderlic Personnel Test unreasonably excluded blacks - at least since 1978 - did not meet its burden of persuasion.

CONCLUSION

The Petition for Writ of Certiorari should be granted. Alternatively, the Court should remand to the Court of Appeals for reconsideration

in light of the intervening decision in Wards Cove.

Respectfully submitted,

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